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JUL - 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 6, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

RE: MM Docket No. 93-155

Dear Mr. Caton:

Transmitted herewith on behalf of Richard P. Bott. II is the

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL - 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In re Application of)

RICHARD BOTT II)
(Assignor))

and)

WESTERN COMMUNICATIONS, INC.)
(Assignee))

For Assignment of Construction)
Permit of Station KCVI(FM),)
Blackfoot, Idaho)

MM Docket No. 93-155
File No. BAPH-920917GO

TO: Administrative Law Judge Arthur I. Steinberg

MOTION TO DELETE ISSUES

Bott, II, 4 FCC Rcd 4924 (Rev. Bd. 1989); 5 FCC Rcd 2508 (1990). RRI's appeal was denied by the U.S. Court of Appeals. Radio Representatives, Inc. v. FCC, 926 F. 2d 1215 (D.C. Cir. 1991).

2. On September 17, 1992 Bott filed an application for consent to assignment of the unbuilt KCVI permit to Western Communications, Inc. in return for Bott's expenses. RRI petitioned to deny the application. RRI argued that "Bott's cavalier choice to blithely abandon his integration pledge" made a mockery of the comparative proceeding (RRI Pet., pp. 6-7), and said that "[t]o grant Bott's assignment application at this time would undermine the very foundation of the Commission's comparative hearing process." (RRI Pet., p. 7.) RRI argued that Section 73.3597(a) of the Commission's rules applied to this application, id, and said that Bott "should not be allowed to violate the Commission's rules, abandon his pledge, and sell the station to an outsider. Under the circumstances presented here, the Commission's Rule [apparently § 73.3597(a)] represents an absolute ban on the assignability of the permit at this time." (RRI Pet., pp. 8-9, footnote omitted.)

3. RRI's petition was opposed by the November 10, 1992 pleading attached as Exhibit A, which was supported by Bott's personal declaration dated November 9, 1992, attached to Exhibit A hereto. Bott's opposition argued that Section 73.3597(a) did not apply to the assignment of an unbuilt permit. Citing Eagle 22, Ltd., 7 FCC Rcd 5295 (1992), Bott showed that the Commission had held (only one month before Bott's assignment application was filed) that only Subsections (c) and (d) of § 73.3597 apply to the

assignment of unbuilt permits. Bott's opposition went beyond the requirements of the rule to show that his decision to assign the permit was not cavalier or blithe, as suggested by RRI, and did not do violence to the integrity of the Commission's licensing process. Bott's pleading showed that he had a reason, sufficient in Bott's judgment, for making a decision in 1992 to assign the permit at no profit.

4. RRI replied to Bott's opposition. In reply RRI argued that the Commission cannot "allow an applicant simply to abandon its integration pledge simply because it cannot develop the specific 'type' of station it claims it wanted... ." RRI Reply, p. 12. This very argument was rejected by the Commission in Eagle 22, Ltd., supra, decided three months before the submission of RRI's misleading argument. RRI's Reply concluded, at pp. 16-17, with an argument which is, in truth, a call for rule making to amend Section 73.3597, but which has nothing to do with the law as it exists today.²

5. Perhaps most significantly, in view of the present posture of this case, RRI's Reply, in a section headed "Background", undertook to summarize Bott's opposition to RRI's petition. RRI there said: "Bott claims that he pursued the permit in order to construct a commercial religious station..." (RRI

² In its Reply, RRI also argued that Bott's decision to assign the permit is a bad business decision, based upon RRI's evaluation of coverage comparisons and program availability, and is certainly not, in RRI's view, of sufficient weight to support the sale of KCVI. The Commission, in Eagle 22, Ltd., supra, rejected this very sort of business judgment second-guessing.

Reply, p. 5). Bott's opposition makes no such claim, and Bott's declaration in support of the opposition is clear on this point -- he decided on his format after the U.S. Court of Appeals affirmed the grant to him of the permit in February, 1991. (Exhibit A at Bott Decl. pp. 1-2.)

The Basis for Deleting Issue (a)

6. The Commission designated this case for hearing with a Hearing Designation Order (FCC 93-290, rel. June 15, 1990) which says, in its most significant passage, that "[i]n response, Bott states that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format." HDO, ¶ 3, underlining added. The fact is that Bott never said that; RRI said, incorrectly and without citation, that he had. A reading of the pleadings, the basis for the HDO, will so demonstrate.

7. Bott has given a further declaration, in response to the HDO, which is attached as Exhibit B.³ In this declaration of June 24, 1993, Bott affirms what seems clear enough from his November 9, 1992 declaration -- that he "did not make the determination to operate KCVI with a commercial religious format until after the grant of [his] permit had been affirmed by the U.S. Court of Appeals in February, 1991 and was no longer in contest." Bott, in Exhibit B, sets forth the sequence of his planning, discovery and

³ The original of this declaration was filed with Bott's Petition for Reconsideration of the HDO on June 25, 1993.

decision to sell. It is apparent from reading Bott's two declarations in this proceeding, that attached to Exhibit A and that attached as Exhibit B, that the conflict between Bott's hearing testimony and his position in this assignment proceeding, supposed in the HDO to exist, does not exist. Without that conflict, which was thought by the Commission to exist and to suggest misrepresentation or lack of candor, there is no basis for Issue (a) in this proceeding.⁴

8. What argument could be made against deletion of Issue (a)? While it might be argued that to delete that issue would terminate the hearing, leading to a grant of the application, that should not be taken as an argument against deleting Issue (a). If Issue (a) had not been mistakenly designated, this application would have been granted. That is clear from Section 73.3597, and it is clear from Eagle 22, Ltd. In this regard, it is worth noting that the permit in Eagle 22, Ltd. was, like Bott's permit, awarded

does not place the presiding officer in conflict with the Commission or with governing law. The statement of law by the Commission within this HDO is concise: "Section 73.3597(a) of the

MOTION TO DELETE ISSUES
EXHIBIT A

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In re Application of

RICHARD P. BOTTLETT

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File No. BAPH-920917G0

released Dec. 12, 1988). The ALJ granted Mr. Bott's application. The Review Board thereafter affirmed the grant. Decision, 4 FCC Rcd 4930 (released June 5, 1989). The Commission subsequently denied an Application for Review which RRI filed. Order, 5 FCC Rcd 2508 (released April 12, 1990). RRI took an appeal to the United States Court of Appeals for the District of Columbia Circuit. The Court filed a judgment denying RRI's appeal on February 22, 1991.^{1/} Nearly nineteen months later, the above-captioned assignment application was filed.

As demonstrated herein, no basis for denial of the assignment application exists. Mr. Bott, throughout the six-year ordeal to obtain the construction permit, maintained in good faith his intention to move to Blackfoot and operate the proposed radio station. That intention changed when circumstances arising only after the Court affirmed the grant made clear the window of

^{1/} RRI did not challenge Bott's integration proposal in its appeal. It did, however, file on February 7, 1991, a "Motion for Remand to Reopen the Record," in which it challenged Bott's ~~integration~~ ^{integration} on the basis of an initial decision in another

As detailed in Mr. Bott's attached Declaration, several months after the Court's judgment was entered, and while Mr. Bott was in the process of making arrangements regarding the Blackfoot station, he learned that a station in the nearby community of Chubbuck, Idaho, had adopted a religious programming format essentially identical to that which he had hoped to implement.

This development dramatically changed the situation in the market. The Chubbuck station had a tremendous head start. Mr.

Bott advanced his integration proposal in good faith and without guile. Mr. Bott in no way has perpetrated a fraud upon the Commission or, for that matter, the Court of Appeals. RRI has presented no evidence to support its unfounded and hysterical allegations.

**RRI LACKS STANDING AND
ITS PETITION IS DEFICIENT**

RRI has not alleged any basis on which it has standing to submit a petition to deny. Nothing indicates that any RRI principal has become a resident of the Blackfoot station's anticipated service area, or that the Blackfoot station would cause interference to any RRI station. Furthermore, RRI's status as a former applicant for the Blackfoot allotment does not confer standing to challenge the above-captioned assignment application. E.g., WCTW, Inc., 26 FCC 2d 268, 269 n.2 (1970); accord, e.g., McClatchy Newspapers, 73 FCC 2d 171, 173 (1979) (mere applicant does not have standing to challenge application); Norman A. Thomas, 53 FCC 2d 646 (1975) (same).

Furthermore, and more importantly, RRI has failed to satisfy the bedrock requirement of Section 309 of the Communications Act that allegations "be supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. §309(d)(1). RRI has presented no affidavit in support of its allegation that Mr. Bott has committed a fraud upon the Commission and the Court. Under the circumstances, RRI's petition should be summarily dismissed.

**RRI'S RELIANCE ON SECTION
73.3597(a) OF THE RULES IS MISPLACED**

RRI argues in its petition that Section 73.3597(a) of the Commission's Rules compels designation of this application for hearing. It cites specifically Section 73.3597(a)(1), which provides that an application for assignment will be designated for hearing if the station involved "has been operated by the current licensee or permittee for less than one year," unless the FCC is able to find, inter alia, that "(1) The permit or license was not authorized . . . after a comparative hearing"

Of course, RRI fails to quote subparagraph (4) of the rule which provides that designation for hearing is not required if the FCC is able to find:

The assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that, due to unavailability of capital, the death or disability of station principals, or to other changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, FCC consent to the proposed assignment or transfer of control will serve the public interest, convenience and necessity.

47 C.F.R. §73.3597(a)(4) (emphasis added).

Here, as Mr. Bott's Declaration demonstrates, significant changed circumstances affecting his proposed construction and operation of the Blackfoot station occurred subsequent to the acquisition of the permit. Furthermore, grant of the assignment

To reiterate, circumstances arising months after the Court of

six-year licensing process, including adjudications before an Administrative Law Judge, the Review Board, the Commission itself, and the Court of Appeals, simply to recoup, without interest, the funds he previously expended. There will be no rush on the part of speculators to go through the ordeal Mr. Bott has. The fact Mr. Bott's window of opportunity closed after grant of his construction permit should not result in Mr. Bott being penalized the entire amount of his investment in obtaining the construction permit. Similarly, the public interest would be ill-served by denying the assignment application and thus delaying initiation of service on

Attachment A

DECLARATION

OF

RICHARD P. BOTT, II

**(Original submitted with Opposition
to Petition to Reopen the Record)**

STATEMENT OF RICHARD P. BOTT, II

In 1985 I decided that it would be good for me to build my own radio stations and go into business for myself. In July, 1985 I filed an application for a new FM frequency in Central Valley, California and an application for a new FM frequency in Blackfoot, Idaho. I selected Blackfoot, Idaho after studying the market as a broadcast market, and studying the competitive situation in the area.

When both applications became designated for hearing at approximately the same time in the summer of 1987, I realized that I then needed to decide where I was going to live and make my home. It was then that I decided to move to Blackfoot and personally run that station.

In September 1987 I traveled to Blackfoot. I met with community leaders, and I looked at available homes and studio space that a real estate agent had picked out for me.

Over the next several years I was disappointed with how long it was taking for this application to go through the comparative hearing process, but it remained my intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when I received the C.P. Throughout this time, I have rented an apartment in Kansas City rather than buy a house, in anticipation of moving to Blackfoot.

In April of 1990, the FCC finally granted the Blackfoot Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the

station with a religious format. All of my previous years of radio experience had involved religious format stations.

As the overall economy had worsened, I knew I could still successfully operate the station and serve the community with a religious format. I had contacts with potential clients, and there was an opening in the market for that format.

On September 25, 1991, I learned that that opening had just closed. On that day I visited the office of Maranatha Advertising in Costa Mesa, California. Its main client is the Word For Today broadcast from Calvary Chapel Church. In a conversation I had with the media buyer, Teresa Rivera, I learned that the church had just purchased a new FM radio station in Pocatello, Idaho that would serve much the same market area I was proposing to serve with my proposed station from Blackfoot. She told me the church was going to increase the station's power and would use a format very similar to the one I was planning to use, featuring many of the same clients I was planning to sell time to.

Upon further investigation I learned that she was correct. The station, KRSS, which is actually licensed to Chubbuck, was acquired by the church in the fall of 1991, and is operated as a commercial religious station. I confirmed that KRSS was going to carry many of the same religious programs I had hoped to put on my station.

For me this dramatically changed the competitive situation in the market. The church had a tremendous head start. I knew it would be many months before I could get my station on the air. I also knew that the market was too small and the economy too "soft" to support 2 commercial religious stations. I felt I had lost a good market opportunity because of the nearly 6 year delay involved in the comparative hearing process.

Throughout the remainder of 1991 and into 1992, I proceeded with planning for construction of the station while I explored the options available to me.

In January 1992, I requested and received an updated site management plan from the BLM. On January 10, 1992 I requested, and later received new call letters from the FCC. I spoke to the president of the Users Group at the transmitter site. I consulted with my engineer and equipment supplier concerning technical aspects of the construction and the necessary equipment. I contacted Mr. Kent Frandsen to proceed with my plans to install my antenna on his tower. Over the course of several conversations, Mr. Frandsen suggested to me that, if anticipated changes in the FCC duopoly law were adopted, he would like to buy my C.P. At first, I told him it wasn't for sale. But upon further reflection, I thought that with the change in the local competitive situation with the format I knew best, and with the poor overall state of the economy, a station with a duopoly operation and its inherent efficiencies and economies probably represents the best hope for a successful operation.

I consulted with my attorney and he told me that FCC law permitted me to sell my C.P. for the expenses I had into it at that point. I then decided that was the best thing to do, and contacted Mr. Frandsen to make arrangements to sell the C.P. to his company, Western Communications, for my expenses.

I declare under penalty of perjury that the foregoing is true and correct.

11/9/92

Date

Richard P. Frandsen

Signature

CERTIFICATE OF SERVICE

I, Marilyn L. Phillips, hereby certify that on this 10th day of November, 1992, copies of the foregoing **OPPOSITION TO PETITION TO DENY** were hand delivered or mailed, first class, postage prepaid, to the following:

Daniel Armstrong, Esquire*
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1919 M Street, N.W.
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1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037


MARILYN L. PHILLIPS

* Hand Delivered

MOTION TO DELETE ISSUES
EXHIBIT B

DECLARATION

I, Richard P. Bott, II, hereby declare as follows:

I am the permittee of Station KCVI(FM), Blackfoot, Idaho, having been granted the permit following a comparative hearing.

An application I filed in September, 1992 to assign the KCVI permit has been designated for hearing. I have reviewed the Hearing Decision and find this declaration to be true and correct.

Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the station with a religious format. All of my previous years of radio experience had involved religious format stations."

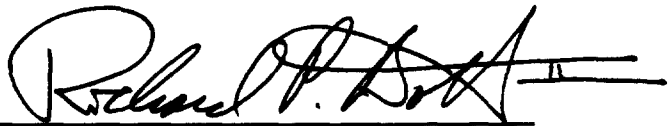
I have, since reading the Hearing Designation Order, reread the opposition to which my November 9, 1992 declaration is attached. At pp. 2-3, the opposition pleading says "circumstances arising only after the Court affirmed the grant made clear the window of opportunity had closed for establishment of the type of radio station Mr. Bott had decided to operate -- a commercial station with a religious format." While that language may have been misinterpreted by the Commission to mean that my format decision was made during the comparative proceeding, before the court's ruling, that is not so. As my declaration attached to that pleading makes clear, I decided to broadcast with a religious format only after the Court of Appeals 1991 decision. In the worsening economy I believed I could operate the station successfully if I chose to use that format. I had over the years developed contacts with persons in the religious broadcasting field -- persons who might be potential timebuying clients -- and I knew in 1991 that there was an opening in the market for that format at that time; that is, no other station in the market was broadcasting a commercial religious format. Then, after I had made my format decision I discovered, in September, 1991, that an FM station in the Pocatello, Idaho area had been purchased by a church and was

going to increase its power and coverage, and use a religious format very similar to the format I had decided upon. I nevertheless continued to move forward with development of the permit, but in 1992 decided to seek to assign it for my expenses.

To conclude, I did not decide upon a commercial religious format for my Blackfoot station until after the grant of my permit was certain, and I have not claimed otherwise in this assignment proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24th, 1993.


Richard P. Bott, II

CERTIFICATE OF SERVICE

I, Roberta Wadsworth, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 6th day of July, 1993, had copies of the foregoing "MOTION TO DELETE ISSUES" mailed by U.S. Mail first class, postage prepaid, to the following:

*Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
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